STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 23, 2005
v	No. 254002 Wayne Circuit Court
GAMAL A. HILTON, Defendant-Appellant.	LC No. 03-008451-01

Before: Owens, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of seven counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(c) and (e), three counts of armed robbery, MCL 750.529, three counts of assault with intent to rob while armed, MCL 750.89, three counts of possession of a firearm during the commission of a felony, MCL 750.227b, and one count of receiving or concealing stolen property less than $200, MCL 750.535(5), a misdemeanor. He was sentenced to concurrent prison terms of twenty-three to forty years each for the CSC, armed robbery, and assault convictions, and to time served (ninety-three days) for the receiving or concealing stolen property conviction, to be served consecutive to three concurrent prison terms of two years each for the felony-firearm convictions. He appeals as of right. We affirm.

I

Defendant first argues that there was insufficient evidence to establish his identity as the perpetrator of the charged crimes. We disagree.

The sufficiency of the evidence is to be evaluated by reviewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find every element of the crime charged beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985). Circumstantial evidence and reasonable inferences arising therefrom can constitute satisfactory proof of the elements of a crime. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991).

In this case, all six victims testified that the perpetrator was a tall, thin, masked man of medium to dark complexion. In each case, the perpetrator wore dark clothes, approached the victims' cars late at night, pointed a gun, identified as a nine millimeter, at them, and demanded their money. Each female victim was forced to kneel and perform fellatio on the perpetrator,

while he held their heads, and then each was forced to bend over, and the perpetrator sexually assaulted them from behind. Approximately a week after the assaults, the police spotted a man fitting the assailant's description enter the park late at night. The suspect crouched under a tree, then crawled toward an unmarked police vehicle. When the officer got out of the vehicle and walked around to the passenger side, the suspect returned to his original crouched position. He ran off into the woods when the police began turning on their flashlights and moving in his direction.

Defendant was arrested at approximately 2:00 a.m. that night while walking down Bramell Street near the park. Defendant was wet from the neck down, smelled like sewer water, and was muddy and dirty. He fit the description of the sexual assault assailant and was dressed in black clothes. Defendant lived in a townhouse abutting the park. A wallet and picture insert belonging to one of the robbery victims, BJ, was discovered in defendant's bedroom; it contained BJ's driver's license, and two registrations and proofs of insurance in BJ's father's name. A nine-millimeter bullet was also found in defendant's bedroom. Defendant's fingerprints were also found on a box that the perpetrator took out of victim MM's car. Defendant had no explanation for any of the physical evidence. Two of the victims, TT and SK, identified defendant's voice at trial as the same voice as the person who assaulted them.

Viewed in a light most favorable to the prosecution, the evidence and reasonable inferences arising therefore was sufficient to enable the jury to find beyond a reasonable doubt that the same person committed each of the charged crimes and that defendant was that person.

II

Defendant next argues that the trial court abused its discretion by admitting a notebook of rap lyrics written by defendant. Defendant argues that this evidence was both irrelevant, MRE 401, and unduly prejudicial, MRE 403. We agree that the rap lyrics were inadmissible as substantive evidence of defendant's state of mind or intent; however, we find the error harmless.

The prosecutor argued that the rap lyrics were admissible to show defendant's state of mind, and the trial court agreed.[1] A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Additionally, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" MRE 403.

In this case, the rap lyrics written by defendant bear some similarities to the charged crimes because they describe similar sexual assaults, a mask, black clothes, and efforts to avoid being apprehended. However, the lyrics are not specific to the victims in this case or the charged

[1] The prosecutor also sought admission of the rap lyrics to compare defendant's handwriting, but admission was not limited to that purpose.

crimes and were not purported to be probative of any specific disputed issue in this case, i.e., intent. The prosecutor argued that the lyrics were representative of defendant's "state of mind" and "what he's doing." Absent some other specific basis for admission, which is not apparent, the lyrics were other acts evidence, properly considered under MRE 404(b).[2] See *United States v Foster*, 939 F2d 445, 455 n 13 (CA 7, 1991); *United States v Houston*, 205 F Supp 2d 856, 865 n 6 (WD Tenn, 2002), aff'd in an unpublished opinion of the Sixth Circuit Court of Appeals, issued September 7, 2004 (Docket No. 02-5831); *Joynes v State*, 797 A2d 673, 677 (Del, 2002). Admission under MRE 404(b) would require that, once a proper purpose was established for admission, the court weigh the probative value of the evidence against the danger of unfair prejudice, MRE 403, and if appropriate, give a cautionary instruction to the jury concerning the limited use of the lyrics. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In this case, however, no such analysis was undertaken, and the court simply admitted the lyrics as substantive evidence.

The prosecutor used the lyrics to cross-examine defendant, reading them aloud, and recited the lyrics again at length in rebuttal argument, attempting to use the lyrics to link defendant to the charged crimes. The lyrics describe sexual and violent acts in crude terms, and contain much profanity. The lyrics were highly prejudicial. Any probative value of the lyrics was substantially outweighed by the danger of unfair prejudice.[3] Therefore, the trial court abused its discretion by admitting the lyrics into evidence.

Nonetheless, error in the admission of bad acts evidence does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). The defendant bears the burden of establishing that, more probably than not, a miscarriage of justice occurred. *Id*. Defendant offers no argument to support his claim that the error requires reversal of his conviction.

In this case, there was overwhelming evidence of defendant's guilt. This included the circumstances of defendant's arrest, his proximity to the crime scene, and his muddy, wet, and sewage-odor condition, for which defendant provided incredulous explanations, such as that he was wet from a water fight. Defendant fit the description of the sexual assault assailant and was dressed in black clothes. Most importantly, in addition to other evidence, one victim's wallet, drivers license, vehicle registration, and proof of insurance were discovered in defendant's bedroom, and defendant's fingerprints were found on a box that the perpetrator took out of another victim's car. Defendant had no explanation for any of the physical evidence. There is

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[2] The prosecutor's argument that the lyrics were admissible to show "state of mind" is more properly made in the context of a hearsay objection, MRE 803(3), rather than an objection based on relevance, MRE 401, and prejudice, MRE 403.

[3] For a similar analysis, see *State v Tolson*, unpublished opinion of the Delaware Superior Court, issued January 3, 2005 (Docket No. 0211007845) (noting that in most cases where rap lyrics were admitted as evidence, the lyrics were written shortly after the crime was committed and contained specific reference to the charged crime or the lyrics were admitted to show motive or prove that the defendant wrote the lyrics, but not as evidence of intent or state of mind).

no indication that the jury focused in particular on the rap lyric evidence. Defendant has failed to show that, more probably than not, a miscarriage of justice occurred because of the error. *Id.* at 378.

III

Defendant next argues that defense counsel was ineffective for allowing the victims to remain in the courtroom after their testimony. After defendant testified, two of the victims testified on rebuttal that they recognized defendant's voice as the voice of the perpetrator.

Because defendant failed to raise this issue in a motion for a new trial or a *Ginther*[4] hearing, our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that she was not performing as an attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994), *Hurst, supra*. Defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question. *Id*.

It is undisputed that defense counsel consented to the victims remaining in the courtroom after their testimony. But, at the time, counsel may have consented for strategic reasons, i.e., so as not to antagonize the jury, and defendant has not overcome the presumption that counsel's conduct might be considered sound trial strategy. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

In any event, counsel objected to the voice identification testimony before the witnesses were called to the stand, and moved for a mistrial, which the court denied. However, the court stated that it would allow the defense wide latitude in its cross-examination of the rebuttal witnesses. Further, the defense called two male victims in sur rebuttal, both of whom failed to identify defendant by his voice. As noted previously, although the evidence against defendant was circumstantial, it was very strong. In particular, there was no explanation for the presence of BJ's personal belongings in defendant's bedroom, or defendant's fingerprints on a box in MM's car. Defendant has not demonstrated that, but for counsel's alleged error, there is a reasonable probability that the outcome of the trial might have been different.

IV

Defendant also argues that the trial court erred in declining to entertain defendant's motion for a new trial based on juror misconduct. We disagree.

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[4] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A new trial may be granted on any basis that would support reversal on appeal, including to prevent a miscarriage of justice. See MCR 6.431(B); see also *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998).

After the trial court imposed sentence, defense counsel stated that she had moved for a new trial based on juror misconduct, but had not been able to submit an affidavit in support of the motion because the juror in question failed to appear at her office and apparently was not returning counsel's telephone calls. Counsel indicated that her request for an adjournment had been denied. The trial court also declined counsel's request that the court voir dire the juror in question, who was subpoenaed, because of the lack of an affidavit.

Although defendant now argues that the trial court erred by not entertaining his motion for a new trial, defendant never did submit a supporting affidavit, either below or on appeal, and he does not discuss the alleged misconduct in his appellate brief. A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). We therefore deem this issue abandoned and decline to consider it.

V

In a pro se brief, defendant argues that he was deprived of a fair trial because police officers presented false testimony, and because the prosecutor knowingly presented this false evidence. We disagree.

Constitutional questions are reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999). But because defendant never presented these claims to the trial court, they are unpreserved. We review unpreserved issues for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 548-549, 552-553; 520 NW2d 123 (1994); see also *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000).

As defendant correctly argues, a conviction based on falsified evidence violates due process. See *People v Herndon*, 246 Mich App 371, 417; 633 NW2d 376 (2001); *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998). Additionally, a prosecutor may not knowingly use false testimony, and must report and correct perjury committed by a government witness. *Herndon*, *supra* at 417; *Lester*, *supra* at 276-278. But a finding of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The mere fact that certain testimony may be contradicted does not compel the prosecutor to disbelieve his own witnesses and correct their testimony. *Lester*, *supra* at 278-279; see also *Herndon*, *supra* at 417-418.

In this case, the record does not support defendant's claims that his convictions were secured by false evidence, or that the prosecutor either knowingly presented false evidence or knowingly allowed false testimony to stand uncorrected.

Although defendant points out that the search warrant return form listed only one wallet, whereas a preliminary complaint report and testimony at trial referred to two wallets, this discrepancy was addressed at trial and was attributed to how a separate wallet insert that BJ

normally carried inside his wallet was characterized. Whether the alleged discrepancy was adequately explained at trial was a matter for the jury to decide. It does not demonstrate that false evidence was used to secure defendant's convictions.

Contrary to defendant's claim that the police could not have searched his home until after they interrogated him because they did not know his address before then, Sergeant Coleman testified at trial that defendant disclosed his address at the scene of his arrest and that officers then went to defendant's home and were allowed to search it. Thus, defendant has not demonstrated that the evidence that defendant's house was searched before defendant was interrogated was false.

Nor is there any merit to defendant's claim that the police falsely testified that defendant's wife consented to the search of defendant's home. At trial, defendant's wife admitted that she consented to the search. Further, defendant does not challenge the trial court's denial of his suppression motion wherein he argued that his wife had not consented to the search.

Finally, the fact that TT and SK both testified that they recognized defendant's voice as the voice of their assailant after hearing, for the first time, defendant's voice at trial does not establish that they testified falsely merely because they had previously testified that they did not recognize their assailant's voice.

For these reasons, we reject defendant's claims that false evidence was knowingly used to secure his convictions.

VI

Next, defendant argues that his due process rights were violated because the police failed to preserve the clothes he was wearing when he was arrested. Defendant asserts that, if this evidence had been preserved, it could have contradicted the officers' claims that his clothes were dirty and muddy.

The United States Supreme Court has held that unless a defendant can show bad faith on the part of the police, the failure to preserve potentially useful evidence is not a due process violation. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). The due process clause does not impose "on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution." *Id.*

In this case, there is no likelihood that the missing clothes could have exonerated defendant. The presence or absence of dirt and mud on the clothes was relevant only to whether defendant may have been the same person the police observed skulking in the park. That fact was not a material issue in the case, however. Rather, the material evidence against defendant was that he matched the physical characteristics of the perpetrator and, more significantly, that personal items stolen from BJ were found in defendant's bedroom, along with a nine-millimeter bullet, and that defendant's fingerprints were found on a box in MM's car.

Accordingly, defendant has failed to show that the police acted in bad faith in failing to preserve his clothes. Indeed, there is no indication that defendant ever asked for the clothes. Therefore, we reject this claim of error.

VII

Defendant further argues that defense counsel was ineffective for failing to interview police officers, failing to obtain a videotape of defendant's bond hearing, failing to investigate the arrest of another masked person, failing to locate and call an alibi witness, and refusing to argue that the police fabricated the story about the wallet and his wife's signature on the consent to search form. Because defendant did not raise these issues in an appropriate motion in the trial court, our review is limited to mistakes apparent from the record. *Hurst, supra*.

"Decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Failure to call a witness or present evidence only constitutes ineffective assistance if it deprives a defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710-711; 538 NW2d 465 (1995), vac'd in part on other grds 453 Mich 902; 554 NW2d 899 (1996). In this case, there is no indication in the record that counsel was deficient in the manners alleged, or that defendant was deprived of a substantial defense.

First, it is not apparent that a videotape of defendant's bond hearing would have disclosed the condition of his clothing. Furthermore, as previously discussed, this was not a critical issue at trial and the absence of evidence on this point did not deprive defendant of a substantial defense. We therefore reject defendant's claim that counsel was ineffective for failing to obtain a videotape of defendant's bond hearing for the purpose of enabling the jury to possibly see whether defendant's clothes were muddy.

There is no record evidence concerning the arrest of a different masked person, or whether this person may have fit the physical description of the perpetrator of the charged crimes in this case. Nor does the record indicate to what extent, if any, counsel considered and investigated this evidence. Accordingly, there is no basis to conclude that defense counsel was ineffective with respect to this evidence, or that defendant was deprived of a substantial defense.

Regarding defendant's claim that counsel was ineffective for failing to present an alibi witness, defendant testified at trial and never claimed that he was elsewhere on the nights of the assaults. Nor is there any record support for defendant's claim that he asked counsel to locate an alibi witness. To the extent that defendant wanted counsel to call the men who defendant allegedly purchased marijuana from, or fought with, on the night he was arrested, defense counsel may have determined that these witnesses were not credible or would not have affected the outcome. Indeed, because there is no claim that these witnesses would have been able to account for defendant's whereabouts on the nights of the charged crimes, defendant cannot show that counsel's failure to call them deprived him of a substantial defense.

Lastly, having found no merit to defendant's claims that the police falsely testified that two wallets were found, and that defendant's wife consented to a search of defendant's home, we reject defendant's claims that defense counsel was ineffective for failing to argue these points at trial. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

VIII

Defendant next argues that the trial court abused its discretion by qualifying Marcia McCleary as an expert in latent fingerprint identification. We conclude that defense counsel's statement affirmatively expressing that she had no objection to McCleary being qualified as an expert waived this issue for purposes of appeal. An "apparent error that has been waived is 'extinguished'" and, therefore, is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001); see also *People v Carter*, 462 Mich 206, 215-220; 612 NW2d 144 (2000).

IX

Lastly, defendant argues that the trial court erred in rejecting defense counsel's claim that the prosecutor exercised his peremptory challenges in a discriminatory manner to exclude black jurors. Defendant additionally asserts that blacks were systematically excluded from the jury venire.

"This Court reviews for abuse of discretion a trial court's ruling regarding discriminatory use of peremptory challenges." *People v Eccles*, 260 Mich App 379, 387; 677 NW2d 76 (2004). A claim of systematic exclusion is reviewed de novo. *Id.* at 385.

The use of peremptory challenges to strike potential jurors solely because of their race violates a defendant's right to equal protection. *Id*. at 387, relying on *Batson v Kentucky*, 476 US 79, 84-88; 106 S Ct 1712; 90 L Ed 2d 69 (1986); see also *People v Bell (On Reconsideration)*, 259 Mich App 583, 589-590; 675 NW2d 894 (2003), lv gtd 470 Mich 870 (2004). "To establish a prima facie case of discrimination based on race, the opponent of the challenge must (1) show that members of a cognizable racial group are being peremptorily removed from the jury pool and (2) articulate facts to establish an inference that the right to remove jurors peremptorily is being used to exclude one or more potential jurors from the jury on the basis of race." *Id*. at 590-591.

"[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide whether the opponent of the strike has proved purposeful racial discrimination (step three)." *Id*. at 590. "The burden of persuasion never shifts to the party exercising the challenge," it remains on the opponent of the challenge. *Id*. at 592.

In this case, after defense counsel raised a *Batson* objection, the prosecutor responded that he had peremptorily dismissed three black females, a black male, and two white females, and that there was no pattern of discrimination. Although the prosecutor offered to explain his reasons for excluding the prospective black jurors, the trial court stated that defendant had not

yet met his burden of proof. Defense counsel conceded that there were legitimate reasons to excuse the black male, and that the prosecutor had excluded two white females, but maintained that the prosecutor had no legitimate reasons to exclude the three black females. The court denied defendant's challenge, concluding that counsel had failed to establish a prima facie case of purposeful discrimination.

Contrary to defendant's argument, the trial court did not improperly shift the burden of proof. Rather, "the burden of persuasion never shifts to the party exercising the challenge," it remains on the opponent, i.e., defendant. *Bell*, *supra* at 592. Although defendant showed that the prosecutor used half of his peremptory challenges to excuse three black females, defendant failed to articulate any facts to establish an inference of purposeful discrimination. We conclude that the trial court did not abuse its discretion in denying defendant's *Batson* challenge.

Regarding defendant's systematic exclusion claim, our Supreme Court has held that "[t]o establish a prima facie violation of the fair cross-section requirement, a defendant must show that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000).

In the present case, while blacks are a distinctive racial group, because defendant did not raise this issue below, the record contains no information concerning the racial composition of the jury venire from which prospective jurors were selected or the racial composition of Wayne County, from which the venire was drawn. See *People v McKinney*, 258 Mich App 157, 161-162; 670 NW2d 254 (2003). Thus, as in *McKinney*, "we have no means of conducting a meaningful appellate review of defendant's allegations on appeal." *Id*. at 161-162. Because defendant has failed to show plain error with respect to this unpreserved issue, appellate relief is precluded.

Affirmed.

/s/ Donald S. Owens
/s/ Mark J. Cavanagh
/s/ Janet T. Neff